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NO. 72-191

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

HUMBLE OIL & REFINING COMPANY,
Petitioner

v.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS, JESSE JAMES, STATE TREASURER, AND CRAWFORD MARTIN, ATTORNEY GENERAL, OFFICIALS OF THE STATE OF TEXAS,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals for the Third Supreme Judicial District of Texas (Pet.App. 24-33) is reported at 464 S.W.2d 170. The opinion of the Texas Supreme Court (Pet.App. 34-44) is reported at 478 S.W.2d 926.

JURISDICTION

The judgment of the Texas Supreme Court was entered on March 29, 1972, and timely Motion for Rehearing was denied by said Court on May 10, 1972. The petition for a Writ of certiorari was filed on August 3, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). Respondents do not concede that jurisdiction exists.

QUESTION PRESENTED

The question presented is whether the Texas oil and gas production business privilege taxes[1] arising from Petitioner's production business activities carried on within the Corpus Christi Naval Air Station, a federal enclave over which the State of Texas granted exclusive jurisdiction, are "income taxes" within the meaning of the Buck Act[2] and thus, may be levied on the production activities of Petitioner.

STATUTES AND PROVISIONS INVOLVED

The Buck Act provides:

4 U.S.C., § 106:

> "(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

4 U.S.C. § 110:

> "(c) The term 'income tax' means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts."

The Texas statutes provide:

20A Vernon's Texas Civil Statutes, Taxation-General, Article 3.01:

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[1] Chapter 4 (with respect to oil) and Chapter 3 (with respect to gas), Title 122A, Taxation-General, Vernon's Texas Civil Statutes.

[2] 4 U.S.C. §§ 104-110 (set forth in Appendix I hereof).

"(1) There is hereby levied an occupation tax on the business or occupation of producing gas within this State, computed as follows:

A tax shall be paid by each producer on the amount of gas produced and saved within this State equivalent to seven and one-half percent (7½%) of the market value thereof as and when produced. . . ."

20A Vernon's Texas Civil Statutes, Taxation-General, Article 3.02:

"(1) The market value of gas produced in this State shall be the value thereof at the mouth of the well; however, *in case gas is sold for cash only, the tax shall be computed on the producer's gross cash receipts.* Payments made by purchasers to producers for the purpose of reimbursing such producers for taxes due hereunder shall not be considered a part of the producer's gross cash receipts. *In all cases where the whole or a part of the consideration for the sale of gas is a portion of the products extracted from the producer's gas or a portion of the residue gas, or both,* the tax shall be computed on *the gross value of all things of value received by the producer, including any bonus or premium; . . . .*" (emphasis added)

20A Vernon's Texas Civil Statutes, Taxation-General, Article 4.02:

"(1) There is hereby levied an occupation tax on oil produced within this state. . . . Provided, however, that the occupation tax herein levied on oil shall be four and six-tenths percent (4.6%) of the market value of said oil whenever the market value thereof is in excess of One Dollar ($1) per barrel of forty-two (42) standard gallons. *The market value of oil,* as that term is used herein, *shall be the actual market value thereof plus any bonus or premiums or other things of value paid therefor* or which such oil will reasonably bring if produced in accordance with the laws, rules and

regulations of the State of Texas." (emphasis added)

Sections 351, 352 and 357 of Title 30, U.S.C. (part of the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 351, *et seq.*) are set forth in Appendix II hereof.

STATEMENT

This litigation concerns the jurisdiction of the State of Texas to levy its oil and gas production taxes on Petitioner's oil and gas production business operations conducted on the Corpus Christi Naval Air Station, a federal enclave wherein exclusive jurisdiction has been granted by the State of Texas, save only the right to serve process and certain qualifications in the Deed of Cession concerning duration and the tax exempt status of such lands.

Petitioner has produced oil and gas under a federal oil and gas lease since May of 1963, and from 1963 until April of 1967 paid the Texas oil and gas production business-privilege taxes without protest. Since 1967, said taxes have been paid under protest and this suit was instituted for their recovery.

The state oil and gas production business-privilege taxes here in question are income taxes as defined in the Buck Act and are measured in the same manner as "gross income" from such production operations is measured under 26 U.S.C. § 613 (Internal Revenue Code) which provides for a percentage depletion based on "gross income" from the property.

Petitioner calculates income for federal depletion purposes and income for purposes of the state production taxes *as to these production operations,* in one and the same manner and has, therefore, reported the same amounts, to the dollar, as "value" for Texas oil and

gas production business tax purposes and as "gross income" for depletion purposes under 26 U.S.C. § 613. (See Answer to Request for Admissions, Stipulation of Facts, p. 5, and Texas Supreme Court Opinion, 478 S.W.2d 926, 931-932; Pet.App. 43.)

Depletion is taken by Petitioner when the crude minerals are produced and at that time the deduction is allowed from income.* (Statement of Facts, p. 45)

ARGUMENT

The fact that no conflict of decisions exists, and the very limited circumstances under which the questions here presented can arise, illustrate that this question is not one which warrants review by this Court on Petition for Writ of Certiorari.

Before the Buck Act definition can be in issue, the land involved must be in an area of exclusive federal jurisdiction, must have been acquired by the federal government after 1920† and must be located in a State that has a selective income or value received measure in its tax on that business. Also the oil or gas deposits must be in an already existing field where outside production is *actually* draining the federal mineral deposits, for it is the inherent right of the executive division of government to protect federal property that authorizes the making of this type of lease. The ordinary lease would be made under the Mineral Leas-

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*The underlying theory of the deduction is to allow ". . . a tax-free return of the capital consumed *in the production of gross income through severance.*" (emphasis added) *Anderson* v. *Helvering*, 310 U.S. 404 (1940) page 408.

†If such lands were acquired prior to that time, or if the land was originally part of the public domain, the Mineral Leasing Act of 1920, 30 U.S.C. § 181, *et seq.*, would apply and 30 U.S.C. § 189 consents to taxation of the lessee's production business under *Mid-Northern* v. *Walker*, 268 U.S. 45 (1925).

ing Act for Acquired Lands which consents to the tax in issue here.

I

The tax in issue here falls within the Buck Act definition of income tax and the decision below is clearly correct.

In *Howard* v. *Commissioners of the Sinking Fund of the City of Louisville,* 344 U.S. 624 (1953), which involved the Buck Act and State taxation within a federal enclave in a portion of Louisville, this Court held that it did not matter that the tax involved was not an "income tax" by Kentucky law. Since the tax there involved was measured by, and levied with respect to, the income *from the taxed activity,* it was a Buck Act income tax even though not denominated or classified as an income tax under local law, and even though it reached only certain items of income.

The question here is whether the Texas oil and gas production taxes are taxes "with respect to, or measured by" income or receipts from the business-privilege taxed.

The legislative history of the Buck Act[4] clearly demonstrates an intent of Congress to expand the application of the terms "income tax", "gross income", "gross receipts" and "net income"[5] past any set definition or concept of those terms, and to allow any tax levied on, with respect to, or measured by income or receipts from the business taxed. Congressional intent to get away from a concept of only one type of income tax is shown in Senate Report No. 1625,[6] as follows:

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[4] 4 U.S.C. §§ 104-110

[5] 4 U.S.C. § 110(c)

[6] S.Rep. No. 1625, 76th Cong., 3d Sess. 5 (1940)

> "[t]his definition [of income tax] . . . *must of necessity cover a broad field because of the great variations* to be found between the different State laws. The intent of your committee in laying down such a broad definition was to include therein any State tax (whether known as a corporate franchise tax, *or business-privilege tax,* or any other name) if it is to be levied on, with respect to, or measured by, net income, gross income, or gross receipts." (emphasis added)

The type of state taxes referred to, especially the business-privilege taxes, demonstrate beyond any serious doubt the intent of Congress to include any tax that was levied on, with respect to, or measured by income or receipts from the business taxed, including those which do not necessarily result in a sales transaction, but where the gain and benefit is equally enjoyed. The Texas oil and gas production taxes as measured on Petitioner's production operations here involved, are unmistakably *measured by* the income and receipts of these business operations and are taxes *related to* such income and receipts.

The Texas Supreme Court in this case, held in 478 S.W. 2d page 931, (Pet.App. 42-43) that:

> "The Texas oil production and gas production taxes attach when these minerals have been produced and severed from the earth, *when they have been reduced to possession and have come within the dominion and control of the producer.* . . . The tax, as applied in this case is levied on and measured by the value in money or money's worth of the minerals, whether they be sold, used, or otherwise disposed of. The tax *attaches* upon the receipt and is measured by the gross value of that received." (emphasis added)

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*Petitioner cites *State* v. *Humphrey,* 159 S.W.2d 162 (Tex. Civ.App. 1941, no writ) and two opinions of the State Attorney General for the proposition that only severance is re-

The gas production business tax statute specifically states that the measure is the gross cash receipts from gas sold for cash and the value received from gas sold for other than cash. Where there is not a sale at the point where the production business ceases, however, the value received is used just as it is used to determine "gross income" from such business activities under 26 U.S.C. § 613. As we have stated, the measures used by Petitioner to calculate "gross income" under Section 613, and "value" both as to gas and oil for purposes of the State taxes are the same with respect to their production business operations here involved.

That the same measure applies as to the oil production business is shown by the opinion of the Texas Supreme Court in this case.

The gas production business tax statute also specifically states that the gas must be "saved" and under the opinion of the Texas Supreme Court in this case, this same rule applies with respect to oil production. The court has construed the taxes, both as to oil and gas production operations, to attach when the oil and gas have been reduced to the possession, dominion and control of the producer. The Texas Supreme Court stated, 478 S.W.2d, at 931 (Pet.App. 43):

> "At that point there has been an inflow of wealth, an accretion to wealth, an economic gain in money or money's worth."

Where the producer sells his production at the end of such production operations, gross receipts from that sale would reflect the true income, receipts, and value

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quired for the tax to be due as to oil production. That unreviewed opinion of a state appellate court and the opinions of the State Attorney General are on facts wholly dissimilar from those at bar. Furthermore, in so far as *State* v. *Humphrey* might say what Petitioner says, *it is clearly overruled by the Texas Supreme Court in this case.*

received from said operations.[9] Where it is not sold at this point, fair market value reflects the true income of the production business.

A use or disposition of the production without its sale cannot be excluded from income, receipts, or value received from the business-privilege as this would create an unjustifiably arbitrary and unfair discrimination between independent and integrated production businesses when both engage in the same taxable business-privilege of producing oil and gas, and the gain and benefits are equal to each producer from the income producing activity.

Petitioner refers to the fact in its petition that both the oil and gas production taxes have minimum measures not involved here which are not related to the gross income or value received from the production operations. Such measures are a specific amount per barrel or m.c.f. (~~million~~ Thousand cubic feet of gas) and are indeed unrelated to income from the business.[10] Petitioner does not contend that such measures or any other special measures are involved here but believes that their inclusion in the taxing statutes prohibits those statutes from consideration as an "income tax" under the Buck Act even though the income related measure is the only one used with regard to the business operations here in question.

Petitioner argues that under the Buck Act, receipts or income as used in the Section 110(c) defini-

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[9]What the producer sells its mineral products for at this point is the measure of value used for both the Texas oil and gas production business taxes and the measure of "gross income" under 26 U.S.C. § 613.

[10]Such measures have not been used since oil has sold for $1.00 or more per barrel and since gas has sold for 1 cent or more per m.c.f..

tion of income tax, means only receipts on income resulting from sales transactions.

The sales tax provisions in 4 U.S.C. §§ 105 and 110(b) already allow taxes on receipts resulting from sales. (set out in Appendix I). It is true that "gross income" and "gross receipts" will include taxes measured by sales generated receipts or income, but these terms are not limited to sales receipts, and in fact *such a limitation would completely nullify any meaningful effect* of such terms as defined in the Buck Act. This clearly is not the effect intended, and the congressional intent to allow *gross income and receipts related taxes* on all business pursuits taxed by the states, including those that do not necessarily result in a sales transaction, even though there is equally as much benefit, wealth, gain, and income derived and enjoyed from the pursuit of that business, is unmistakably shown by the legislative history.

There is not a better example of this type of business than the mineral extraction industry, where integration can do away with the need for sales transactions in order to derive the benefits and gain from the business.[11]

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[11]Many states have mineral production related taxes which specify income or proceeds as the measure and in every case such tax measures are construed as the value of minerals as the Texas production business taxes are measured and as "gross income" under 26 U.S.C. § 613, is measured. *Klies* v. *Linnane*, 117 Mont. 59, 156 P.2d 183 (1945); *United States Smelting, Refining & Mining Co.* v. *Haynes*, 176 P.2d 622 (Utah, 1947); *Forbes* v. *Thomas Gracy Consolidated Virginia Mining Company*, 94 U.S. 313, (Nevada, 1877); *Missouri K. & T. Ry. Co.* v. *Meyers*, 204 F.2d 140 (Oklahoma, 1913). Value of Production has also been used to determine income for taxes other than those levied with respect to the business itself. *Magnolia Petroleum Co.* v. *Oklahoma Tax Commission*, 121 P.2d 1008 (1941); *Texas Company* v. *W. A. Cooper*, 107 So.2d 676 (La.Sup. 1958).

Business-privilege taxes are much more limited in scope than general income taxes and are not tied to a sale or exchange *since the taxable event is the doing of business and not the transaction* that may or may not take place in conjunction with the business operation. Petitioner's position presumes that sales or exchanges are the only taxable event contemplated by the Buck Act. This simply is not the case.

The measure of selective "gross income" from the standpoint of a mineral producer's production activities, is provided in the federal tax laws, in 26 U.S.C. § 613. This measure is used to determine the percentage depletion allowance that may be deducted from the gross income of a producer to allow him a tax-free return of capital *consumed in the production of gross income through severence.*[11] The capital so consumed is the minerals *in situ* produced as income through severence. The depletion deduction is expressed as a percentage of the "gross income" from the property (Internal Revenue Code of 1954, 26 U.S.C. § 613) and "gross income" from the property is defined in the Income Tax Regulations, § 1.613, as follows:

> "In the case of oil and gas wells, gross income from the property, as used in Section 613(c)(1), means the amount for which the taxpayer sells the oil or gas in the immediate vicinity of the well. If the oil or gas is not sold on the premises but is manufactured or converted into a refined product prior to sale, or is transported from the premises prior to sale, the gross income from the property shall be assumed to be equivalent to the representative market or field price of the oil or gas before conversion or transportation."

In the case before us, the gross income from the property with respect to the Corpus Christi Naval Air

[11]See footnote 3, supra.

Station lease reported by Petitioner for federal income tax depletion purposes is the same, to the dollar, as the market value of produced oil and gas from those leases reported by Petitioner for Texas occupation tax purposes. Said gross income includes the value of all production regardless of the method of its disposition.

This depletion allowance is taken by Petitioner when the minerals are produced (p. 45, Statement of Facts) just as the business-privilege taxes are levied when the minerals are produced and reduced to the producer's possession, dominion and control.

As stated by the Texas Supreme Court at 478 S.W.2d page 930, such taxes are levied *on or with respect to* income under the federal case law. In *Helvering* v. *Brunn*, 309 U.S. 461 (1940), this Court held that a landlord-taxpayer who had come into possession and full ownership of a building erected upon his land by a lessee who had forfeited the lease and caused a reversion to the lessor was in receipt of income. The taxpayer had claimed that the added value to his land can be considered "gain" only upon the owner's disposition of the asset. The opinion held that the gain was realized by the landlord-taxpayer in the year of repossession of the leased premises. In *Commissioner* v. *Wilcox*, 327 U.S. 404, 407 (1946) this Court held that no single criterion had been found to determine in all situations what is sufficient gain to support the imposition of an income tax. However, in *Old Colony Trust Company* v. *Commissioner*, 279 U.S. 716 (1929) and in *Commissioner* v. *LoBue*, 351 U.S. 243 (1956), this Court held that income comprehends an accession to wealth in the form of economic benefit, value in money, or money's worth. Gain of the use and dominion of a valuable good or thing is income and there is no requirement that it be sold or converted into cash. *Helvering* v. *Brunn, supra.* In

that case there was a lessor-lessee relationship as discussed above just as there is a lessee-lessor relationship in this case.

As stated by the Texas Supreme Court on 478 S.W. 2d, page 930 (Pet.App. 38-39), income ". . . may be considered as the money, or money's worth, which comes during a definite period. *It is to be distinguished from capital,* which is a fund of wealth at a particular time. See Seligman, Income Tax, 7 Encyclopedia of the Social Sciences 628-631 (1932). The essence of income is an inflow constituting an accretion to wealth, identifiable and measurable in money or money's worth, though not necessarily in cash." (emphasis added)

It has long been held by this Court that minerals produced and extracted by a miner *do not constitute capital* but that such production or extraction operations are income producing activities of a taxpayer. *Stratton's Independence* v. *Howbert,* 231 U.S. 399 (1913); *Stanton* v. *Baltic Mining Co.,* 240 U.S. 103 (1916). In the *Stratton's Independence* case, this Court held with respect to an income-measured corporate tax that there could be no deduction from gross income, allowed for the value of the minerals *in situ.* Had these mineral products been considered as capital rather than gross profits such a deduction would have applied. Later in the *Stanton* case, dealing with the federal corporate excise tax measured by income, this Court reaffirmed and clarified its holding in the *Stratton's Independence* case and though agreeing that such a tax was on the product of the mine, stated with respect to the taxpayer's argument that it:

> ". . . moreover rests upon the wholly fallacious assumption that looked at from the point of view of substance *a tax on the product of a mine is* necessarily in its essence and nature in every case a direct tax on the property because of its owner-

ship unless adequate allowance be made for the exhaustion of the ore body to result from working the mine. We say wholly fallacious assumption because independently of the Sixteenth Amendment it was settled in Stratton's Independence v. Howbert, 231 U.S. 399, *that such a tax is not a tax upon property* as such because of its ownership, *but a true excise levied on the results of the business of carrying on mining operations"* (pp. 413 *et seq.*) (emphasis added)

These two cases clearly show that an income measured tax with respect to the mineral production business, is a tax on the product of the mine and was a true excise on the results of the business of carrying on mining operations. The Texas oil and gas production taxes are equally measured by the income, or are related to the income or receipts of the mineral production business.

In *Alexander* v. *King,* 46 F.2d 235 (10th Cir. 1931), 74 A.L.R. 174, the Court of Appeals for the Tenth Circuit referred to the *Stratton's Independence* and *Baltic Mining* cases, *supra,* stating: (page 240)

> "In Stratton's Independence v. Howbert, 231 U.S. 299, 34 S.Ct. 136, L.Ed. 285, the taxpayer mined goldbearing ore from beneath its own lands. *The value of the ore recovered, less the cost of recovery, was treated as income under the Corporation Tax* Act (36 Stat. 11, 112, c. 6). . . .
>
> . . .
>
> "Stanton v. Baltic Mining Co., 240 U.S. 103, 36 S.Ct. 278, 60 L.Ed. 546, involved the Income Tax Law of 1913. The court approved of the doctrine of the Stratton case, and held that *the proceeds from mining operations—the value of the ore less the cost of recovery—was income,* and that the tax was not a property tax because the statutory al-

lowance for depreciation might be inadequate." (emphasis added)

For purposes of taxation it has been held both in England and in this country that the product of a mine is a proper subject of taxation under income tax laws. *New Creek Co.* v. *Lederer,* 295 Fed. 433, (3rd Cir. 1924), cert.den. 265 U.S. 581, 44 S.Ct. 456, 68 L.Ed. 1190.

Petitioner does not question the fact that the measure here involved is one of benefits, wealth, and gain derived from the production operations. A tax on the product of a mine or other mineral extraction business, is a tax on the results of that business[13] such as Petitioner's production business activities carried on within the federal enclave.

II

The decisions of the Texas Courts are correct by reason of the qualifications contained in the Deed of Cession and by reason of the consent to tax given in the Mineral Leasing Act for Acquired Lands

The arguments here presented are additional reasons for denying the Petition for Certiorari under the authority of *Langres* v. *Green,* 282 U.S. 531, 535-539; *Walling* v. *General Industries Co.,* 330 U.S. 545, 547; and *Jaffke* v. *Dunham,* 352 U.S. 280, 281, which allow Respondents to urge arguments rejected or not passed upon by the court below as reasons not to grant the petition for writ of Certiorari. The Texas Court held that such lease did not effect a recession of jurisdiction over the mineral deposits and that court did not reach any questions concerning the coverage of the mineral leasing laws. That court recognized that these questions,

[13] *Stanton* v. *Baltic Mining Co.,* 240 U.S. 103 (1916).

including the question of recession, were controlled by federal law.

We believe that the Texas Court should have held that under the federal law governing the effect of the qualifications and the lease, a partial recession of jurisdiction over the mineral deposits sufficient to permit taxing was effected.

The Deed of Cession contains the following language:

> "That I, W. Lee O'Daniel, Governor of the State of Texas, in the name and in behalf of the State of Texas, do hereby cede exclusive jurisdiction over the said land, to use, occupy, own, possess and exercise jurisdiction over same *as long as the same remains the property of the United States of America, . . .*" (emphasis added)
>
> "This Deed of Cession is made pursuant to Articles 5242, 5247 and 5248 of the Revised Civil Statutes of Texas, 1925, and in accordance therewith the United States of America shall be secured in its possession and enjoyment of all said lands, and said lands and all improvements thereon *shall be exempt from any taxation under the authority of the State of Texas, so long as the same are held, owned, used, and occupied by the United States of America for any of the purposes expressed in the foregoing statutes and not otherwise.*'"[1] (emphasis added)

United States Acceptance Provision:

> "Pursuant to the provisions of the aforesaid act, jurisdiction is hereby accepted on behalf of the United States of America in the manner and form ceded by a certain Deed of Cession from the Governor of Texas to the United States of America, dated December 12, 1940, over certain lands de-

[1] The purposes enumerated in Articles 5242, 5247, and 5248, do not include the use of the land for mineral production.

scribed therein which are in the custody of the Navy Department, to wit, ..."

Even if complete title is not vested in the lessee a real property interest in the deposits is conveyed equal to the lessee-Petitioner's right to extract the oil and gas and to appropriate same to its own use and benefit." *It is only this jurisdiction over the right to produce and appropriate the oil and gas deposits, conveyed to Petitioner, that Respondents contend was receded for taxing purposes.*

An interest in real property at least equal to the right to drill for, extract, and dispose of the mineral deposits, was conveyed and to the extent of that interest a recession occurred under the terms of the Deed of Cession.

Petitioner does not argue with the fact that a Deed of Cession may provide qualifications, but only that the lease did not effect a recession. In *Palmer* v. *Barrett*, 162 U.S. 399 (1895) this Court construed a similar qualification of a grant of exclusive jurisdiction as follows, 162 U.S. at 403:

> "Looking at that act, we find . . . that it was therein expressly provided 'that the United States may retain such use and jurisdiction as long as the premises described shall be used for the purposes for which jurisdiction is ceded, and no longer . . .' . . . The power of the State to impose this condition is clear."

"The Granting Clause of Petitioner's Protective Oil and Gas Lease provides: "In consideration of rents and royalties to be paid, and the conditions and covenants to be observed as herein set forth, the lessor does hereby grant to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits owned by the lessor, except helium gas, in or under the following-described land situated in . . . ." The Lease's duration is for so long as oil and gas are produced in paying quantities.

A lease of vacant lands adjoining the Naval yard had been made to the City of Brooklyn for market purposes and this Court held that said land was "clearly not used by the United States and occupied by it for a naval yard or naval hospital." (162 U.S. at 403) and that, 162 U.S. at 404:

> ". . . the case then presents the very contingency contemplated by the act of cession, that is, the exclusion from the jurisdiction of the United States of such portion of the ceded land not used for the governmental purposes of the United States therein specified. . . . it is clear that under the circumstances here existing in view of the reservation made by the State of New York in the act ceding jurisdiction, the *exclusive authority* of the United States over the land covered by the lease *was at least suspended* whilst the lease remained in force." (emphasis added)

In *Humble* v. *Waggoner*, 376 U.S. 369 (1964), this Court referred to the holding of the *Palmer* case,[11] but distinguished it on the grounds that in the *Waggoner* case, which concerned an oil and gas lease, the authorizing statute contained no conditions. Here the Deed of Cession is a *qualified* grant of jurisdiction over and reservation of the right to tax the property. Here the taxes are on the use of a part of the "land" conveyed in the Deed of Cession and measured by the value of the use of said portion of the "land". An interest in land (whether a full fee-simple title in, or only an exclusive right to use or take a portion of said land) was conveyed by the lease, such interest no longer remains in the United States, and jurisdiction is receded to the extent of such interest, the use of which is here taxed. It is Respondents' position that this recession of jurisdiction and right to tax whatever interest was thereby

[11] 376 U.S. at 371, n.3.

conveyed, gives the State the corollary right to tax the use and benefits arising directly from that interest.

The second reason not reached by the court below is that the Mineral Leasing Act for Acquired Lands[11] *provides Congressional consent to levy the Texas production taxes,* 30 U.S.C. § 357.[12] This Section contains the same language construed by this Court, with reference to Section 189 of the Mineral Leasing Act,[13] in *Mid-Northern Oil Company* v. *Walker,* 268 U.S. 45 (1925), where it was held that:

> "... *the authority of the state* [to levy an annual license tax measured by the gross value of the oil produced] *exists in virtue of such* [congressional] *consent.* Section 32 (41 Stat. 450) [now 30 U.S.C. § 189] ...." 268 U.S. 48. (emphasis added)

An exception of mineral deposits in military lands[14] from the Mineral Leasing Act for Acquired Lands was explained by the legislative history which showed that such mineral deposits were not suitable for mineral development.[15] Here this reasoning does not apply as these deposits and the lands are being developed for their minerals and the exception should not apply when such lands are, *in fact,* suitable for mineral development. The inherent power of the executive de-

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[11]30 U.S.C. § 351, *et seq.*

[12]Set out in Appendix II hereof.

[13]30 U.S.C. § 181, *et seq.*

[14]Said exception in Section 352 is set forth in Appendix II hereof. See also footnote 7, *supra.*

[15]The legislative history of the Act shows that the exception of military lands from its coverage was based on the assumption, and inserted only because, such lands were not suitable for mineral development: "The bill would except from its provisions certain lands which obviously are not suitable for mineral development such as military lands and surplus lands subject to early disposal." H.R. No. 550, 1947, 80th Cong., 1st Sess. (1947). (U.S. *Code Congressional Service,* 80th Cong., 1st Sess., p. 1666.)

partment to make protective leases should be constructed in accord with the congressional scheme of the mineral leasing acts because otherwise unregulated mineral development contrary to the primary purpose of all the federal mineral leasing laws, and in conflict with the requirement of such congressional authorization contained in Article 4, Section 3, Clause 2, of the United States Constitution is allowed.

The exception in 30 U.S.C. § 352 should not be construed to reach a result obviously and clearly not intended nor contemplated by Congress. The exception provision can be and should be construed to accomplish only the purpose for which it was inserted by Congress by restricting its application to those lands not, in fact, suitable for mineral development, in conformity with said congressional intent and purpose.

CONCLUSION

In conclusion we would emphasize the fact that there is no conflict of decisions between the lower courts and the question here raised is not of sufficient importance to warrant review by this Court.

Leases such as Petitioner's are not a common or ordinary method of leasing federal mineral deposits as there must be drainage from such deposits allowing the exercise of the inherent power to protect such deposits even though the federal mineral leasing laws do not apply to such lands. Of course, we have argued that such laws should apply, and allow the taxes here in question once the lease is actually made.

If such leases were common or were to become common, Congress would surely clarify its position with respect to the coverage of such leases under the mineral leasing laws, particularly 30 U.S.C. § 352, and if the statute does not apply to a lease such as peti-

tioner's, Congress would have to provide some authority to make such leases as the United States Constitution requires in Article 4, Section 3, Clause 2.

The small number of leases of this type negates the position that the lower court decision would significantly diminish, if effect at all, bonus moneys received by the Federal Government. Likewise, its royalties would be effected very little, if at all, by the lower court's decision. All other producers in the same oil or gas field wherein this type of lease must exist, pay the business-privilege taxes.

The fact that no conflict of decisions exists or has been asserted, and the narrow scope of this question as shown by the limited circumstances under which it can arise, illustrate that this question is not one which warrants review by this Court on Petition for Writ of Certiorari.

PRAYER

For the reasons shown above, Respondents respectfully pray that the Petition for Writ of Certiorari be denied by this Court.

Respectfully submitted

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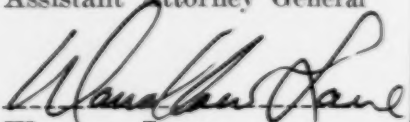

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APPENDIX I

Buck Act, 4 U.S.C. § 104 *et seq.* (54 Stat. 1059-1060):

4 U.S.C. § 104 (Originally amended in Section 7 of Buck Act, 54 Stat., 1060):

§ 104. Tax on motor fuel sold on military or other reservation[1] reports to state taxing authority

(a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

(b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month.

(c) As used in this section, the term "Territory" shall include Guam, July 30, 1947, c. 389, § 1, 61 Stat. 641, amended Aug. 1, 1956, c. 827, 70 Stat. 799.

4 U.S.C. § 105 (Section 1 of Buck Act, 54 Stat., 1059):

§ 105. State, and so forth, taxation affecting federal areas; sales or use tax

(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940. July 30, 1947, c. 389, § 1, 61 Stat. 641.

4 U.S.C. § 106 (Section 2 of Buck Act, 54 Stat., 1061):

§ 106. Same; income tax

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received

after December 31, 1940. July 30, 1947, c. 389, § 1, 61 Stat. 641.

4 U.S.C. § 107 (Section 3 of Buck Act, 54 Stat., 1060):

§ 107. Same; exception of United States, its instrumentalities, and authorized purchases therefrom

(a) The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of personnel of any branch of the Armed Forces of the United States, under regulations promulgated by the departmental Secretary having jurisdiction over such branch. July 30, 1947, c. 389, § 1, 61 Stat. 641, amended Sept. 3, 1954, c. 1263, § 4, 68 Stat. 1227.

4 U.S.C. § 108 (Section 4 of Buck Act, 54 Stat., 1060):

§ 108. Same; jurisdiction of United States over Federal areas unaffected

The provisions of sections 105 to 110 of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit

the jurisdiction of the United States over any Federal area. July 30, 1947, c. 389, § 1, 61 Stat. 641.

4 U.S.C. § 109 (Section 5 of Buck Act, 54 Stat., 1060):

§ 109. Same; exception of Indians

Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed. July 30, 1947, c. 389, § 1, 61 Stat. 641.

4 U.S.C. § 110 (Section 6 of Buck Act, 54 Stat., 1060):

§ 110. Same: definitions

As used in sections 105-109 of this title—

(a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.

(b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.

(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term "State" includes any Territory or possession of the United States.

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State. July 30, 1947, c. 389, § 1, 61 Stat. 641.

APPENDIX II

30 U.S.C. §§ 351, 352 and 357:

30 U.S.C. § 351, in part:

"As used in this Chapter 'United States' includes Alaska. 'Acquired lands' or 'lands acquired by the United States' include all lands heretofore or hereafter acquired by the United States to which the 'mineral leasing laws' have not been extended. . . ."

30 U.S.C. § 352, in part:

". . . all deposits of . . . oil, oil shale, gas, . . . which are owned or may hereafter be acquired by the United States (exclusive of such deposits in such acquired lands as are . . . (b) set apart for military or naval purposes, . . .) may be leased by the Secretary under the same conditions as contained in the leasing provisions of the mineral leasing laws, . . ."

30 U.S.C. § 357, in part:

"Nothing contained in this Chapter shall be construed to affect the rights of the State . . . to exercise any right which they may have with respect to properties covered by lease issued under this Chapter, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States."